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Nos. ~~8,587~~, 8,588.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES LUX ET AL.

APPELLANTS,

VS.

J. B. HAGGIN ET AL.

RESPONDENTS.

BRIEF FOR RESPONDENTS ON REHEARING.

GARBER, THORNTON & BISHOP,

ATTORNEYS FOR RESPONDENTS.

Filed May 25th A. D., 1885.

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Demurrer

IN THE

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STATE OF CALIFORNIA.

CHARLES LUX ET AL., Appellants, vs. JAMES B. HAGGIN ET AL., Respondents.	Nos. 8587, 8588.

We have heretofore—in the brief signed by Louis T. Haggin, attorney for respondent, and Garber, Thornton & Bishop, and Flournoy, Mhoon & Flournoy, as counsel, and in the petition for a rehearing signed by Garber, Thornton & Bishop—fully argued the questions involved on this appeal, and purpose now to avail ourselves of the leave granted by the Court, mainly to restate and condense the positions there elaborated, with such references to said brief and petition as will enable your Honors easily to refer to such portions thereof as you may deem it proper further to consider.

As the brief referred to has two sets of paging, we will state, that unless the contrary is indicated, our references are to the second set of paging of the brief, commencing after page 275 thereof, and headed "Argument and Authorities."

I.

We endeavored to show what was the common law of England, as it existed, was accepted and understood of all men prior to the colonization of America, and until after the year 1800, and that it was simply the California doctrine of appropriation. In the reign of James I, in one of Bacon's most considered and deliberate writings, we find this expression: "Regarding the case of the commonwealth as a kind of common property, which, like the air and water, belongs to everybody," etc. (*Life of Bacon*, in *English Men of Letters*, p. 67.) If the law in his time had been understood as it was by Lord Denman, Bacon would easily have found a more suitable simile.

While we think the position fully maintained and decisive for us, yet as the contrary view in no way weakens our other positions, which do not at all depend upon the decision of this question, we leave it on the argument already printed.

Brief, pp. 23-31, 68, 69, 70, 71, 103-104, 106-107.

II.

Conceding, then, for the sake of this argument only, that the common law was as Lord Denman conceived and made it, to what extent, if at all, was it adopted, or has it obtained in California?

For the purposes of this inquiry, and also only for the sake of the argument, we may concede that by the Spanish and Mexican law, riparian rights did exist in California before the cession; and consequently, that after the cession, as before, such rights being appurtenant and not personal or in gross, continued to subsist as parcel of all lands granted by the former government. The only question, then, with which we have to deal is, what was the law of California as to the water-rights appurtenant to lands belonging to either the State or the United States?—the contention of appellant being that all common-law riparian rights were as strictly appurtenant to and parcel of such lands as the soil thereof and the rocks and trees found and growing thereon—nay, more, incapable of severance from the land; not the subject of grant, except as appurtenant to and passing with it. Or, in the language of Story, that natural streams, existing by the bounty of Providence for the benefit of the land through which they flow, are *incidents annexed by operation of law to the land itself.*

This result is reached, and can only be reached, on the theory that such was the *policy* of which the common law is the expression, and that California by statute adopted that common law—a theory which necessarily involves the further assumption that that portion of the common law was "adapted to the existing state of things in California," (19 Wend., 318)—"adapted to our condition"; "not only not inconsistent with the spirit of our institutions, but *not framed with special reference to the physical conditions of a country differing widely from our own*," (20 Wendell, 159) "adapted not only o the moral, but to the physical, condition of California," (5 Wendell, 463); "applicable without working the most mischievous consequences," (115 Mass. 210); "not repugnant to our customs and statutes," (12 Cal. 538); "applicable to our local situation," (2 Binney, 483; 42 Penn. St. 220; Angell, 549; 10 Ill. 140; 31 Miss. 185; 13 Gratt, 502.

Upon the concessions we are now making, perhaps the best way to treat the above stated theory of appellant is to imagine that California, prior to our acquisition, had been uninhabited and so without any laws or government, and that consequently, in enacting the code, the proviso or saving clause respecting riparian rights had been omitted from it. Then suppose a party had taken possession of a tract of State or United States

land near the outlet of a stream rising in the Sierra Nevada and emptying into the Sacramento. Afterwards and before he has utilized any of the water, which he has and never can have any use for, a miner near the source diverts it and carries it a hundred miles off to work the placers and to irrigate the gardens and supply the inhabitants in the mining regions. It would hardly be contended that such diversion could be enjoined—especially on a bill filed four years and three hundred and sixty-four days after the completion of the canal at the expense of millions, with the result of depopulating whole counties.

Petition, pp. 29-41; Brief pp. 113, 114, 115, 116, 48 to 53.

But what was the *principle* of this California law of appropriation. Was it simply because the fee was in the State or United States? or was it because the riparian law was inapplicable—was framed with reference to the physical characteristics of a country widely differing—would lead to most mischievous results, etc. ?

It does seem to us that both common sense and precedent dictate the answer that the former consideration had nothing to do with it, the latter everything.

The fact that the fee was in a third party—was outstanding—would have been just as pertinent, if,

instead of exhibiting his bill to enjoin the diversion of the water, the locator of the land had brought an action of trover or trespass for the taking away of portions of its soil, or of the trees growing on it. If he sued in ejectment, a plea of title paramount or outstanding would be overruled. Why? Because and only because the common law, in this instance *applicable*, etc., allowed the owner of land so to recover it, and because the locator is presumed to be the owner. If the common law made the right to the flow of the water appurtenant to, parcel of the land, annexed it as an incident to the land, equally as the rocks, trees, etc., unless *inapplicable*, etc., that portion of the common law would protect the locator of the land as to the flow of the water, equally and for the same reasons as to the tree, etc. Can any other instance be cited where any portion of the applicable and therefore adopted common law has been denied its full force and operation in favor of the possessor presumed to be the owner of State or United States land?

In Merritt v. Judd, 14 Cal. 64, it was argued that a fixture was a chattel, because to be a fixture it must be annexed to a freehold, and the locator had no estate of freehold in the land; but the Court said that on principle a house built on public land is a fixture—that the *reason* which makes it a fixture after the fee has passed, makes it one before—that the possessor was the owner, etc. On the

other hand, though the fee has vested, if the law of fixtures invoked is inapplicable, unsuitable, etc., it will be rejected.

Van Ness v. Packard, 2 Peters, 144.

So in Page v. Fowler, 28 Cal. 610, the technical real estate doctrine that a personal action cannot be used to try the title is applied; and in Sparks v. Hess, 15 Cal. 196, that of vendors' lien and what passes as "parcel and appurtenant."

Instances might be multiplied indefinitely. Wherever the presumption of ownership following the possession of land has not drawn to it all the common-law incidents of ownership, it is because, and only because, the doctrine of the common law invoked is inapplicable, unsuited to our condition, etc.; notably and peculiarly in the case of rights to air, light and water, claimed as appurtenant, incident and parcel of and to the inheritance or ownership.

So in Atchison v. Peterson, 20 Wall. 507, and Basey v. Gallagher, *Ib.* 670, it is stated that the common-law doctrines declaratory of the rights of riparian owners were at an early day found to be *inapplicable.* Inapplicable to what? Certainly not to the tenure as being freehold or merely possessory, but to the necessities of miners in the former and of farmers in the latter cited, case. It is true, the fact that all the land was public is given as one reason why the courts were free to reject

this portion of the common law. Not, however, as a reason why it was inapplicable, unsuited, etc., but simply to explain that there were no vested rights, as in the case of Mexican grants, to forbid the courts giving a correct construction to the statute adopting the common law. The cases cited show conclusively: first, that this portion of the common law was inapplicable, unsuited, etc., to our condition, and therefore was not adopted as the law of California, in so far as California was free to adopt a law and a policy in the premises; and second, that as to all lands of which then—from the beginning of our existence as a State—the fee was in the State or United States, this dogma of the common law was never in force.

Evidently, if, as we are supposing, all the land in California had been public land, the law as laid down in Basey v. Gallagher, and the early California cases by which it is supported, would have been the law throughout California, without exception or limitation whatever.

Such would then have constituted the policy and therefore the law of California. It is equally clear that it would have been a permanent, and not a temporary policy, and that inasmuch as no single reason or consideration upon which the policy and law rested, was or could be at all affected by the subsequent sale and disposition of the land by the United States or this State, such

sale would not displace the law of appropriation, or substitute the policy of England for the policy of California; that such *ex post facto* events could not alter the construction already placed upon the statute adopting the common law.

If, by that statute, the common law, in this regard, was adopted at all, it at once affected and applied to all the lands and waters in California to which it could constitutionally apply. It was just as applicable to the lands of the United States as to lands already sold or granted away by the United States. If, by the law of Mexico, the doctrine of riparian rights had already annexed to certain lands, before the conquest granted to individuals, appurtenant rights to flowing waters, such rights would be excepted out of the operation of the modern common law, if our statute adopted this portion of it, not because the modern common-law doctrine was not the policy and law of California, but because its adoption would not vary or take away vested rights of property. On the other hand, if the modern English common law of riparian rights was so inapplicable, as not to form part of the common law so adopted by our statute; and consequently, if from and after the Conquest the old common law or the doctrine of appropriation became the policy and law of California, it might not affect or vary the rights annexed as parcel thereof to lands granted by Mexico.

The question would still remain, what passed as incident or appurtenant to the Mexican grant? As to these lands, it is immaterial, therefore, whether we construe the statute adopting the common law as embracing the modern English doctrines of riparian rights, or as excluding them as inapplicable, unsuitable and repugnant to our policy. No matter what was the policy or the law of the State of California, it would not retroactively qualify the effect of the grant by the Mexican Government.

If the right to the flow of the water was as much the property of the grantee, his heirs and assigns, as the rocks and trees, a change of law and policy would not take away the right to the water any more than it would divest the right to the trees.

Now, suppose the State of California had declared no policy and enacted no statute on the subject of descents, etc., except by adopting generally the common law of England. One lawfully in possession, occupation and enjoyment of State or federal land, dies. Would the land descend to his heir or go to his administrator? Would any one think of suggesting any distinction in this respect, between the case of a possessor, presumed to be the owner, or a pre-emptioner or patentee holding a State or federal patent, and thus proved to be the owner? In case of

a will devising realty one way and personalty the other, it would be conceded that the land in either case belongs to the devisee. Why? Simply because by the policy and the law of the State, land, on account of its physical characteristics, qualities and properties, is distinguished from chattels; and because whatever reasons existed for giving the fee to the heir also dictated giving the possessory claim to the heir—because the policy and law in question have reference to and are based upon the nature of the property, and not upon the nature and dignity of the title to the property, or the manner in which it was acquired, or the tenure by which it was held.

So, in respect to the right to flowing water, to the existence of riparian rights as annexed to land. If there exist a law or a policy annexing such rights, it must arise from and depend upon considerations wholly independent of the tenure by which the land is held and the mode of its acquisition. Lord Denman gave all the reasons for this policy which have ever been given, and they may all be summed up by saying that the water is annexed to the land because it adds to the value of the land. When the courts of California, notwithstanding the adoption of the common law, rejected the modern doctrine of riparian rights between settlers on the public domain, they necessarily decided that that doctrine was inapplicable, and therefore not embraced

within the statute adopting the common law; or they decided that it was an innovation and no part of the common law intended to be adopted. If the former, they decided that appropriation was the policy and the law of California, in so far as the State of California could adopt and declare a law and a policy in regard to flowing waters; decided that the reasons given by Story and Denman ceased in California, and with them ceased the riparian law which rested on them as its basis and foundation.

Is it not self-evident that if the climatic and other conditions in California had been the same as those obtaining when and where Story and Denman and others declared the judge-made law of riparian rights, the Courts of California would simply and without modification have followed the precedents made by them?—would and must have equally applied them to public and private land—to possessary claims and to fee-simple titles after sale and patent? But *because* the conditions were different, and to the extent of the difference, a local law, the very antithesis of the modern common law, was held to be the law and policy of California; that modern common law was held to be no part of the common law adopted by the statute—was held to be *inapplicable*, and therefore a policy and law which was applicable to and consistent with our policy, wants and conditions, obtained. Thus and for

these reasons the law of appropriation became the law of California, and this law must necessarily be as permanent as the necessities out of which it was born. On him who maintains that the statute adopting the common law, which for years after its enactment did not annex riparian rights as incident to State and federal lands, now does annex them, lies the burden of giving a valid reason for such a change of construction. In the absence of any statutory change, this must be given, on the maxim *cessante ratione.* But not one of the reasons of this law of appropriation has lost one iota of its original force and cogency. If the riparian law now contended for had been part of the common law, and had been applicable, then the law of California would always have been (except as to rights vested under Mexican law) identical with the law in England and other common-law countries and States. The fact alone that it was not, for many years after the statute adopting the common law, the same as the modern riparian doctrine, demonstrates either that the latter was not part of the common law, or that it was inapplicable, etc. As to the fact of difference, all agree. For instance, Washburn (Easements, p. 335) speaks of " The *peculiarity* of the local laws of California, whereby the common law, as to the rights of riparian proprietors to the natural flow of the stream through

their lands, is essentially modified." Whether we account for the existence of this peculiar local law in California, on the theory that the modern riparian rule is an innovation, or on the theory that it was here *inapplicable*, etc., the result is the same. On the former theory, we must say with the text writers, (Goddard's Law of Easements, Bennett's edition, p. 251), that this riparian doctrine "was not established until comparatively modern times; and in the earlier decisions of the courts, a theory of a very different kind was advanced, by which rights were supposed to be acquired by the appropriation of water. * * * The earliest doctrine on this subject appears to have been that flowing water was the property of no one, and that nobody had any particular right to use it until somebody actually took possession and applied it to a purpose of utility;" and so, following such cases as Hill vs. King, (8 Cal. 338) maintain the right of appropriation by construing the statute adopting the common law, to have adopted it as stated in the extract from Goddard.

On the latter theory, we simply follow the construction of the statute adopting the common law, which results from Basey v. Gallagher and Atchison v. Peterson and the California cases there approved—that is to say, that the portions of that common law here invoked, were not within the scope of that statute because they were inappli-

cable. If not the law of the State lands and United States lands, as to what lands could this common law have applied? The only other lands were those held under Mexican grants, and as to those, the rights of the grantees were fixed and vested. But as to all lands belonging to the State or the United States, the policy of the State at once created and made the law. That law must be sought either in the local customs, or the legislation of the State or the decisions of the Courts (20 Wall, 684). Looking to those sources we find that the essence of the State policy and law was appropriation as contradistinguished from riparian rights—that its very soul was the negation of the idea of annexation to the banks of the right to water *as incident or* appurtenant—that "the legislation and the decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land," (20 Wall 683); that "the right to water by prior appropriation for any beneficial purpose is entitled to protection," (Ib.); that this "was a customary law, with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition," (Ib. 684); that this "right to water by prior appropriation * * * is limited in every case, in quantity and quality, by the uses for which the appropriation is made"—the appro-

priation not creating such an absolute right, that the appropriator can allow the water to run to waste and prevent others from using it, (20 Wall. 514); a perfect illustration of the absolute repugnancy of appropriation to riparian right; that "the first appropriator had only the right to insist that the water should be subject to his use and enjoyment *to the extent of his original appropriation;* * * * to this extent * * his rights go and no further; and in subordination to them, subsequent appropriators *may use the channel and waters of the stream,*" etc. (*ib.* 514). That for eighteen years—from 1848 to 1866—this was the law governing property in water on the public lands, (98 U. S. 458, read in connection with 20 Wall. 682)—as well farming as mining lands. Constituting "*a comprehensive system of common law*, embracing not only mining law, * * but also regulating the use of water for mining purposes," (98 U. S. 459)—and equally a system of common law, governing water rights generally, (20 Wall. 682); "an *established* system to which the people were attached," (98 U. S. 459).

Having ascertained what was the State construction of her own statute adopting the common law, and what the State policy and law, it would seem very plain that in the absence of any act of the State working a change of policy or of law, and in the absence of any constitutional restriction on the power of the State to declare such policy

and law, the question whether to any given lands, certain incidents are annexed by law, or, in the language of Story, "annexed by operation of law to the land itself," is answered. While the land here in question was State land, the State adopted as her policy the doctrine of appropriation and rejected the doctrine of riparian rights. From that moment, there existed in California no law or policy by the operation of which riparian rights could be annexed to such land. There were two methods by which, or rather two capacities in which, the State could act upon or affect these lands: 1st, as proprietor; and 2d, as legislator.

"The owner of real estate has, during his ownership, entire dominion and control over its various natural qualities, and may dispose of and arrange them at will. He may alter the natural distribution of those qualities so as essentially to change the relative values of the different parts. * * The principle is that when the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens, which appear at the time of the sale to belong to it, as between it and the property which the vendor retains."

Upon this principle the State in selling her lands, could at will mould the incidents thereto, in so far as her act only affected her own proprietary rights.

If there was a flowing stream on it, she could make the use of it incident and annex it to such parcels as she saw fit, or she could disannex the use altogether and sell it in gross. In a climate like England, the policy might be to make the water an appurtenant of the land, which is expressed by declaring that it shall always flow as it was accustomed to flow. But as to this land, irrespective of climatic differences, this was not and could not have been the policy or the intention. Where such is the policy and intention, its sole basis is, as we have seen, that as the water was intended by Providence for the benefit of the land, it must be annexed *as an incident to the land itself, and must be allowed to continue in its accustomed flow.* But the swamp land was given to the State solely because the accustomed flow was a detriment, not a benefit to the land; and so far from being given to the State and sold by the State, with any understanding that the flow of the water was to continue annexed to the land as an incident, the very object and condition of both the gift and the sale was that the water should be diverted and disannexed, and the flow destroyed.

Now, can it be that this highly complex, artificial and technical modern doctrine and policy of riparian rights can be applied under these circumstances? According to appellant's own theory, here was an immense body of swamp land, en-

tirely covered by the flow of the water at times, and at other times intersected by a number of small, winding, crooked, shallow channels. These latter, they are forced to claim, is their water-course, for to treat the whole swamp as the water-course would deprive them of all ownership of the banks, and consequently of all claim to riparian rights.

Woods on Nuisance, p. 316, sec. 345.

In such case, the United States, on the findings and evidence, would be the sole riparian owner from the Calloway to the lower end of the lands claimed by the plaintiffs, which, of course, is conclusive in favor of an affirmance.

If we treat the small channels as the water-course, then, upon authority, as well as upon principle, even according to the modern common law, the purchase by the plaintiff from the State gave them no riparian rights as incident to their purchase. The maxim, *cessante ratione*, would apply even in England and the riparian States. Because the swamp land is surveyed and sold by sections and quarter-sections, and these narrow, crooked channels are not made boundaries, but the plats are laid out without any reference to them. See Hoehl vs. City, 57 Iowa, 454, where it is said that "the doctrine of riparian proprietorship cannot be applicable to

property thus situated." See also State v. Milk, 13 Reporter, 709. But there are other circumstances here which much more loudly call for the application of this maxim. Not only is this land platted and sold in regular subdivisions regardless of the water-course, or of the doctrine of ownership *ad medium filum*, one of the essentials of riparian rights; but it is sold in express contemplation of a *general scheme* of reclamation or dis-annexation. It is not the case of a sale of a tract of land on which there is an excess of moisture, only, or presumably, in expectation of its being drained and improved. In such case it might be said that the water was still an incident to the land, and it was for the buyer to determine whether he would divert it, or dis-annex it or not; and if so, how he would do it and what disposition he would make of the waters in so doing. The vendee might say that was a question with which no one but himself was interested or concerned, and until he disturbed the natural relations of the soil and water, the latter in its accustomed flow would continue an incident and appurtenant of the former. But such a claim on the part of any purchaser of any portion of this swamp will not bear a moment's examination. To hold that after such a purchase, there was *annexed by operation of law, as an incident to the very land purchased*, an unconditional, unqualified, vested, common law, riparian right to the accustomed flow of

the water, is to put by implication on the law authorizing the purchase, a construction violative not only of the express condition on which the State accepted the gift of the land, but of the declared purpose of the law so construed. Not only are others interested in the reclamation of the whole swamp, but the very condition of the purchase of each subdivision is that the water shall be taken away from it.

Nor is the question whether, if one purchaser can and does, under the statute authorizing its sale, acquire in one body the whole swamp, the law annexes to the land as an incident the usual, undisturbed and accustomed flow of the water? The construction of the certificates and patent must be the same whether there is one purchaser of the whole swamp, or where there are five thousand purchasers of separate subdivisions of the whole 200,000 acres. Is it conceivable that it was the intention to annex as incident to the grant of each of these subdivisions the modern common-law riparian right to the natural flow of all the waters of Kern River? Even on the supposition that all the evidence offered in rebuttal had been received, and that the Court had found the existence of the small channels as claimed at every point to which the evidence was directed, the other findings made on and supported by the testimony of plantiff's own witnesses, as well as of those of the defendants,

would not have been in the slightest degree affected or modified thereby. In any possible view of the findings and evidence, the riparian rights of the purchasers of subdivisions away from those small channels would have been just as clear, as of those on the channels. If there was any water-course, the whole swamp was the bed of that water-course, and the circumstance that the overflow from the upper lake reached the depressions which are claimed as channels a little sooner and stayed in them a little longer, could only affect the relative value of the common-law incident, and not at all the existence of and right to the incident. The theory of appellants seems to be that though the intention and condition of sale was, that the flow should not, as at common law, be annexed to the parcels sold as part of the land itself, and as therefore a permanent, continuous appendage to the fee, to be used in common by all as riparian proprietors, yet it was to be so annexed temporarily, and until the lands were reclaimed, and then the water so diverted was to be the property of the whole body of former riparian owners, not as appurtenant to any land, but in gross, and to be disposed of as a majority vote should decide. According to this theory, it is a fair inference from the action of the United States and the State, and a fair construction of the Act donat-

ing the swamp to California and of the statutes of California enacted to carry out the purposes of the donation and to comply with the conditions of the donating Act, that as soon as one certificate should be issued for forty acres in this swamp, the whole policy and law of appropriation should *ipso facto* be repealed as to Kern River, and its waters suffered to run to waste in its usual and accustomed flow, until the swamp was reclaimed, and then such flow should cease to be a common-law riparian incident to the swamp, and become a personal right in gross; or, which is practically the same thing, that the waters of Kern River should not be subject to the law of appropriation until the reclamation of the swamp, and then they should become subject to appropriation by a majority of the owners of the swamp, or their or any of their assigns, not of the swamp or portions of it, but of the water itself. Indeed, the result of the present decision in this case may go even further. Under it, cannot the majority of swamp owners, even after they have reclaimed it by diverting the flow, maintain the right to hold it in gross, as a vendible chattel, without ever returning a drop of it to the reclaimed land. As against an appropriator above or below, their sufficient weapon and title is that being annexed as an incident and appurtenant to the swamp, it ceased to be the subject of appropriation. As against a

riparian owner below, setting up the same common-law right, their answer is that here the right is not perpetual as attending a fee in the land, but a sort of base or qualified incident, determinable by reclamation. And during the life of this determinable incident, its only function is to serve as a trustee to preserve the contingent and executory right to be a preferred appropriator. Because, it is evident, that until reclamation, the modern common-law doctrine of riparian rights could not have any sensible, practicable application and operation between these purchasers of swamp lands. It was fruitful enough of litigation, uncertainty and impractability between the owners on the banks of well-defined water-courses, where the uses of water were such as could be exercised on the banks of the stream itself, and where the land was sold, conveyed and held with reference to the *medium filium*, etc. To attempt to apply it here would necessarily end in a maze of absurdities. Take any selected owner of a quarter section, and attempt to define and limit his rights and to adjust them in harmony with the equal and concurrent rights of others! Where is his ripa? What are his rights and what his obligations? The continuity and maintenance of the decrees of Providence and the accustomed flow are fatal and confusing. He cannot use his land in any way without interfering with the equal right of his neighbor. The result is

that the doctrine of riparian rights is simply inapplicable. On the other hand, the doctrine of appropriation is not only applicable, but solves with admirable simplicity all the questions which can arise, and with perfect justice to all concerned. The objective point of the purchaser of swamplands is that the water is a nuisance instead of a benefit to the land he wishes to buy. He therefore buys on condition that he will abate the nuisance. But the land needs some water after it is reclaimed. It is not worth his while to reclaim it without facilities for irrigating it when reclaimed. He therefore inquires whether there is water which he can appropriate for that purpose. If he finds that no appropriation of the water has already been made, he buys the land and takes the proper steps to appropriate the water. Take this very case. An intending purchaser of this swamp looks at it, and concludes to buy. He intends to reclaim the land, and then to control the water, and lead it back for irrigation. What does he have to do? Simply to post and record a notice that he intends to dig a ditch to divert this water, and then to use it for irrigating the former swamp, and to sell the surplus for use elsewhere. Then he proceeds with reasonable diligence to dig the ditch, and his purpose is accomplished. Why should he demand, what is not accorded to other appropriators, the right to claim the water for

speculative purposes, or to lie by for an unreasonable time?

Passing from the action and conduct of the State as a proprietor, to her action and conduct as legislator, we must, of course, take a broader view. In this capacity, the State was called upon as soon as organized to declare a policy and a law of and for the State, as a State, in her political character.

In choosing between a riparian policy and that of appropriation, the first question would naturally be which was most adapted to her physical and climatic conditions and the wants and necessities of her citizens and people. Having decided that this was the doctrine of appropriation, the next and only question would be the extent of her power to adopt and enforce it. And the natural result would be the adoption of appropriation to the extent of such power. That is, appropriation would be the rule, and the exceptions, cases where something prevented its enforcement.

The only possible exceptions would seem to be cases where the adoption of the law of appropriation would divest some vested rights. If a Mexican grant had already been made covering the outlet of a stream, and by the Mexican law such grant passed as an incident the right to the usual flow over the lands above, it would seem that the adoption by the State of a law allowing the water to be diverted above the land granted would constitute

such exception and would divest a vested right. If however, the State adopted the law of appropriation, and after its adoption, the grantee of a Mexican grant covering the whole course of a stream, conveyed the lower half thereof, in construing the deed, it could be construed by the existing State law, and by it might be determined what passed as appurtenant. If the United States, at the time of the adoption by the State of the law of appropriation, owned land and, as appurtenant, the right to the flow, the grantee by Mexican grant of land higher up could not, by virtue of the law of appropriation, divert all the water, against the will of the United States. But still a United States patent, issued after the adoption of the law of appropriation, might be construed by it, and so held not to pass the water right as incident or appurtenant.

If, after the adoption by the State of the policy and law of appropriation, the State issued a patent for her own land, the law authorizing the patent and the law adopting appropriation would, of course, be construed *in pari materia*, and no right to the flow of the water would pass as incident or appurtenant, because there would be no law in force making the one appurtenant to the other. The right to the water would no more pass by the grant of the land, than a deed to a farm would pass a band of cattle grazing on another farm.

As to the lands of the State, even on the concession that before the adoption and promulgation of the State law and policy of appropriation, the right to flowing water was annexed and incident and appurtenant to and parcel of the land bordering its banks, the effect and practical working of that law and policy on the land after its sale by the State and on the construction of the law and patent or other instrument evidencing the sale, is unobstructed by any impediments whatever. As to lands of the United States, the only difficulty was that suggested by a possible want of power in the State, without the consent of the United States, to affect or alter the title to, or incidents of, the public domain, or to prescribe the effect of sales made by virtue of Congressional enactment. The argument was that in the hands of the United States there was incident to riparian lands a certain right in flowing waters; that such right could only be divested or divorced from the land by the act or with the consent of the United States; that the mere passive non-interference of the United States did not constitute such consent or a license to appropriators, and that as there could be no prescription against the United States, her grantee stood in her shoes and became invested with all her original rights. As none of these considerations stand at all in the way of giving full force

and scope to the policy of the State in regard to State lands, we only call attention to their unsoundness in so far as they may be urged by way of analogy. In the first place, the argument above stated ignores the distinction between State legislation which attempts to take away or vary the rights of the United States, or to interfere with the primary disposition of her soil, and the adoption of a State policy, in recognition of which, and with reference to which, the United States would presumably act and legislate. If, for instance, the State had in the outset modified the common law of fixtures so as to do away with the doctrine of constructive annexation, articles constructively annexed would not pass by a United States patent.

So, by the common law, if there was a house with windows on a lot of land, there existed as incident and appurtenant to that land, a right to light and air, and a corresponding servitude over the adjacent land. But as that portion of the common law was inapplicable—was contrary to the policy of the *State*—on a sale and patent by the United States of such a lot, no such right would pass, nor would the patentee of the adjoining land take his land burdened with such a servitude. In other words, the patent would be construed not by the common law, but by the local law of the State.

By the civil law it seems there were annexed as

incident to the land itself, by operation of law, the following easements and servitudes: the right of support *for buildings*; the right to a certain vacant space between the boundary and new buildings; the rightof passage of air, etc.; the right of entry, etc.; to reclaim fruit, etc.

Kaufmann's Mackledey, sec. 286.

If such were the law of California, under Mexico, it would not follow that pre-emption patents would be construed to annex as incidents or pass as appurtenances, such rights and burdens, contrary to the local law, custom and usage of the State of California.

Next, it is now settled that in so far as California changed the common law of riparian rights, the United States did from the beginning assent thereto, and the Acts of Congress of 1866 and later, are now universally held to have been merely statutory recognitions evidencing such prior consent. This consent was contemporaneous with the adoption of the State policy of appropriation; and, as to both State and Federal lands, such concurrent adoption and consent at once destroyed any previous annexation of water to land as incident—terminated the easement and terminated the servitude. It is now the accepted law that where the water was appropriated before the sale and patent the land, the patent passed no water right as in-

cident. Why? Because the United States conveyance is to be construed by California law and with reference to California policy. What law and what policy was it according to which the water ceased to be, or never became, appurtenant to the land? Not in the first instance and primarily that of the United States. All the United States has ever done was to consent to and adopt that of the State. If Congress had never legislated at all, such consent and recognition and adoption could have been *presumed* for all purposes of such construction.

To return to State lands, with which we are alone concerned in this case, the question is: whether the law of appropriation or the modern law of riparian rights was, as to State land, the law of California, when her conveyances here to be construed, were executed and provided for by statute; in other words, did the law of California then by operation of law annex the right to the flow of the water to this land itself?

We have endeavored to show that this question must receive a negative answer, and will briefly notice the argument to the contrary.

It is not and can not be denied, that the law of California, prior to the Code, differed radically from the modern English law; that, notwithstand the statutory adoption of the common law, the doctrine of appropriation did find a place and did

play a conspicuous part in the jurisprudence of California; while it is contended that, early in the century, it was extirpated, root and branch, in England.

The question, then, is narrowed to the inquiry, how far was the English rule, as asserted, modified?—how much of the English law was adopted and how much was rejected?—to what extent did the doctrine of appropriation gain a foothold, and how far did it supersede the English law, or the common law, as interpreted by the appellants? We maintain that the fair and obvious way to answer this is, to consider the reasons and circumstances underlying the policy, the scope and extent of which we are seeking to determine—as well those which favored, suggested and induced its adoption, as those, if any there existed, which stood in the way of its complete adoption as a general and permanent law. That it should not operate so as to divest vested rights is clear; and we submit that it is equally clear that with this single exception it did operate generally and universally. Because, with this exception, every reason which justified or occasioned its adoption at all, equally justified and called for its adoption generally and universally. If, in California, the water should be incident to the land, on State lands, so, for the very same reasons, it should be on Federal lands. The instant the *State* determined against the policy

of annexation, the law which was the expression and declaration of the policy adopted, fixed the status of State lands in this regard. From that moment, in construing a *State* patent as to what passed as incident, the question whether the water was appropriated prior to the patent was necessarily and utterly immaterial. But in construing a Federal patent, it was natural that the courts should decline to decide in advance unnecessary questions, and therefore should say: "Whether the act or policy of the State can affect the title of the United States; whether the United States has ratified and confirmed the action and policy of the State; whether, if the United States shall hereafter repudiate this action and policy, and grant to another the very thing appropriated, the grant or the appropriation shall prevail, are questions not necessary to be now considered. It will be in time to decide them when they arise. For the present it is enough to say, the State law must control. If the appropriator has a license by the tacit consent of the United States, that is *pro tanto* a recognition of the State law. If he has none, neither has his adversary, and until the United States acts or complains, neither can set up the outstanding title."

In fact, it seems that it was not until 1879 that the Supreme Court of the United States was called upon to lay down the law on these deferred or reserved questions; when in the Broder case,

there was an *appropriation of land* (or what is tantamount here, of an interest in specific land) prior to the Act of 1866, by the defendant; a patent (pre-emption) to the plaintiff of the very same land issued after the Act of 1866, and a grant to the grantor of the plaintiff executed prior to the law of 1866, but containing a reservation or exception of all pre-emption, etc., and other lawful claims. Consequently, the case did not raise the precise question whether a United States patent for lands sold by that government in California, passed, as incident or appurtenant to the land, the right to flowing water, whether diverted or unappropriated. But it did call upon the Court to lay down the principles upon which that question is to be solved. The case itself goes much further than we have to go in this case. For its logical result is that, if the Statute of 1866 had never been enacted, a party who in appropriating water had constructed and was maintaining a canal over a section of United States land, could assert his right of way for the canal against one obtaining a patent or grant of the section. It is true, the grant passed upon excepted "all lawful claims," but it was expressly held, that without any aid from the statute of 1866, such right of way was one which the United States had by its conduct "*recognized and encouraged, and was bound to* protect"—that the statute was a voluntary *recognition of a pre-*

existing right of possession, constituting a *valid* claim to its continued use." Now if the exception of lawful claims had been omitted, the question would have been whether upon a fair construction of the pre-emption laws, or rather of the grant, it was the intention to destroy a right of way which the United States was bound to protect, and which was a pre-existing right of possession, constituting a *valid* claim to continued use. We submit that on the same just principle that the pre-emption law was construed, not to warrant an intrusion on actual possession; and on the general rules of construing all grants, private and public, the omission of the reservation could not have varied the result. But we need not dwell on this. However this may be, it is certain that if the statute of 1866 had been enacted in 1850, and the Broder case decided before the early California cases, adverting to the fact that the title was still in the United States, all mention of that fact would have been omitted.

The courts would then have simply said that the State had adopted the law of appropriation, and that the United States had ratified and sanctioned the State law and policy, and, therefore, that, both as to State and federal lands, there was no law annexing the water as an incident to the land.

But it is said while the State adopted the law

of appropriation, it did so only as between appropriators, and not as between owners of the land and appropriators; and hence it is argued, that if the State issued a patent to land from which the water had already been diverted, the patentee could compel its restoration by the appropriator. This last position, it is true, has been repudiated by this Court, but it illustrates the other. If by that is meant that the State policy only applied in favor of prior appropriators of the water and not of the land, then the result would have been that a subsequent appropriator of the land could compel a prior appropriator of the water to restore it. That is a perfectly logical and consistent position. The trouble is it goes too far. It proves there never was any right of appropriation at all. It assumes that by the adoption of the common law, the right to the water was incident to, or, if you please, parcel or part of the land, and that whoever acquired the right, temporary or permanent, to the land, *ipso facto* acquired the right to the water. Again, where the dispute is between two appropriators of water, the only pretense against the prior appropriator must be based on some riparian right, on the modern common-law idea that the water belongs to the land, and the only possible application of the law of appropriation must involve a repudiation of this doctrine of the common law. But, it may be said Mr. McAllister did not go to this ex-

tent. His position at the oral argument was "that the Federal Government under the statutes of 1866 and 1870, granted all its riparian rights * * to * * appropriators. The State never did anything of the kind. * * The United States had said in those statutes * * that the State should regulate * * appropriation * * Here is a State * * in the exercise, so to speak, of a trust given to it by the Federal Government, * * saying "appropriators on the lands of the United States shall appropriate * * but we do not intend to give you our lands."

This is reversing things with a vengeance. If the United States granted all its riparian rights to appropriators, *a fortiori*, did the State. For all the former ever did was to adopt a policy originated by the latter.

If we are right so far, it must be made out by appellants that this doctrine of appropriation only applies where the water is appropriated before the right to the land is acquired. But this contention ignores the essential, vital and substantial difference between appropriation and riparian rights. One says that the right to the flow of the water and the land over which it flows are not parts of one whole—may be disconnected and owned separately. The other, that one is parcel of the other and always goes with it. One says, the right of the appropriator to the water is only coextensive

with its application to a beneficial use. The other that the riparian right is not at all affected by beneficial use. The basis of one is that the water is intended by Providence for the benefit of the *land* and therefore is annexed to the *land;* the other, that the water is intended by Providence for the *individuals* who can and will apply it to any beneficial purpose, whether connected with that or any other land, or not connected with any land, without regard to the locality of the use, and that therefore it shall not be annexed *by operation of law* to any land, but shall belong in gross to the first appropriator *of the water*, so long as he continues so to use it. One adopts the old common law (dicta, if you please)—the other, the modern common law. In one, the ownership of the land is the controlling factor; in the other, it cuts no figure whatever. In one, priority of *use of the water* is all-important; in the other it counts for nothing. In neither has priority of *right to the land* any influence on the existence or extent of the *right to the water.* Moreover, under the law of appropriation, a diversion is not an actionable wrong, unless it be "to the prejudice" of the party complaining; actual damage must be shown: while under the theory of riparian rights, the diversion itself may constitute the deprivation of a right, and give a cause of action.

It is intimated, it is true, in the prevailing opin-

ion, that according even to the California doctrine, a prior occupant of the banks of a stream on the public domain is a riparian proprietor, and vested with all the modern common-law riparian rights. We think it can be easily demonstrated that this intimation should be recalled. It rests upon the assumption of our statutory adoption of this very common law, its reasons and its policy. It presupposes, therefore, the existence here, as in England, of a policy and law, by the operation of which the flow is annexed to the land, as parcel or incident. Then, such being the policy of the State, if A. appropriates all the water of a stream, and takes it in a canal, and afterwards B. occupies a farm over which the stream still flows, above the canal, B. should have, as incident to his land, the right to consume all the water for riparian purposes. There is here no half-way station. Either this doctrine of the common law became the policy and law of California, or the policy of appropriation, its very antithesis, took its place. The very essence of the former was, that *by its operation*, not otherwise, the flow was *annexed* to—became *part of*—the land; could only be appropriated by acquiring the land itself. Imagine a legislature framing a statute adopting the common law as to lands acquired prior to any appropriation of the water, but making appropriation otherwise the general law and policy of the State. The pream-

ble should read, "Whereas, by the common law, flowing water is for the benefit of and gives value to the land over which it runs, and is, therefore, by the policy of that law, annexed to the land as incident thereto and parcel thereof; and whereas, said common law and policy are unsuited to our wants, necessities and condition, which require that water may be freely diverted and appropriated, and carried wherever it can be beneficially used; and whereas, the common law is also contrary to the policy of California, in that it allows the owners of the banks of the streams to condemn the waters thereof to disuse, and to hold the same for purposes of mere speculation. Therefore, be it enacted, that by the law of this State, flowing water shall not be annexed to the land as an incident, but shall be subject to appropriation separate and apart from the land, and such appropriation, if *bona fide*, shall give the right to the use of the water, but only in so far and so long as the same is with reasonable diligence and in good faith applied to and used for beneficial and useful purposes. Provided, however, that from and after the time that any person shall have inclosed and taken possession of any portion of the banks of a stream, whatever may be the volume of water, or the length of the water-course, or however near the outlet such possession be taken, from that time the policy and law of appropriation shall cease to be

applicable to any of the waters of such stream, and thereafter the common law of England, as interpreted and declared since the separation, shall apply to the banks and waters throughout the course of said stream."

Is it not self-evident that if any such hybrid policy and law had been suggested, it would at once have occurred to the framers of the policy and law of California, that if it was wise to adopt the common law at all, it should be adopted thoughout; and that if it was wise to adopt appropriation at all, every reason for such adoption equally favored its adoption as a grand, general, comprehensive, permanent system of State law; and especially that it would be the acme of folly to incorporate into it the very provisions of the common law peculiarly inimical to the practical and beneficial working of the rule of appropriation. For example, how idle and preposterous could it have been to guard and hedge the right of appropriation, as was done, by the wise limitation and restriction that it should only be exercised for a beneficial use—that the initial steps must be followed up with due and reasonable diligence—that an appropriation for mere purposes of speculation was void *ab initio*, and a *bona fide* one voidable by cessation of the good faith or upon failure of continued application to the beneficial uses, which at the same time such an easy and

obvious device for evading compliance with these safeguards, as the simple inclosing and holding of a possessory claim on the banks was held out as an inducement to the idle and speculative. And who would risk the investment of thousands or millions of dollars and long years of endeavor and vigilance, in carrying out the great objects of the law of appropriation, if he must first explore the stream from source to outlet in investigation of possibly abandoned possessory rights to the banks.

In fact, under this theory, would it not have been impossible for the scheme of appropriation to have any practical operation? Where would you expect to find a water-course capable of supplying water for appropriation on any extended scale, on which, somewhere from source to outlet, there were not many temporary and other holdings—many possessory rights to the banks, of one kind or another—the claimants scattered as usual in these migratory and unsettled times, and the recording laws inapplicable and affording no protection to the most diligent inquirer?

On our contention, on the other hand, the policy of appropriation had found expression and declaration in a complete scheme and system of law—rounded in all its parts—just to all, and properly characterized as one to which people were attached, and with the workings of

which they had become familiar. Every portion and element of the public domain was subject to this law. While the law sanctioned, it also limited, and guarded against abuse, by its wise restrictions, every such appropriation of every such element. For the very same reasons, it forbade speculative appropriations of water to the builder of a ditch or canal, as to the incloser and occupier of a pre-emption claim or possessory right. For the one to attempt to hold, and condemn to disuse, the surplus beyond what he had, with reasonable diligence, endeavored to subject to his avowed and declared and designated beneficial uses, was as much an infraction of its wise policy, as for the other to seek to accomplish the same result in a formally different way. But, especially, we insist, that from the moment the law and policy of the State ceased by their operation to couple together the land and the water, it became a solecism to speak of an appropriation even of the land as being an appropriation of the flow of the water. It was an every-day occurrence that one would appropriate the land, and another the water —the taker of the land might not want the water. Even as to specific land, a prior location is not conclusive; two parties may appropriate the same land for different purposes, where the *use* for one purpose does not conflict with the *use* or *purpose* of the prior location, (9 Cal, 590). It was never sup-

posed that miners locating claims covering the banks of large streams like the Yuba became riparian proprietors in the sense here contended for. If they wanted to use the water in working their claims, they were expected within a reasonable time to indicate their intention and to appropriate what they needed. But it never entered into the mind of one of them, that as riparian proprietors, they could do the necessary work to hold their claims and so indefinitely condemn the water from appropriation above, or if appropriated, levy tribute at will on all the canals in the country. So, if a man located a grazing ranch, and so appropriated by using it for that purpose, he never thought of claiming the right to more than his cattle could drink. If he took up a timber ranch, he never thought that gave him the absolute right to hold speculatively all the water of the river running through it. If he needed water to run his grist or saw mill, he appropriated the water *eo nomine*, and never thought of resting a claim to it on his posession of the timber or wheat land. If he contemplated the raising of crops by irrigation, he took care to ascertain first that there was flowing water on or near his land sufficient for the purpose, and not already devoted to other beneficial uses, and then he proceeded to appropriate it, according to circumstances. If he had to bring it from a distance, he posted a notice and dug his ditch with

proper dispatch; if on his claim, he contented himself with the actual notice resulting from the application of the water, and dispensed with the constructive notice. In all cases the right came from appropriation in one way or another, and was measured by the extent of the appropriation, and not from or by the law of riparian ownership. If the mere taking possession of bank land had constituted riparian proprietorship, then truly, as Judge Murray held, the courts in California "might with propriety have maintained the rights of water companies, on the ground that they were riparian owners." In most, if not in all cases, the canal owners did take and gain the right to the possession, and the possession of the bed and banks of the stream. In many cases, as the records show, they built substantial dams clear across, extending a long distance over the banks; sometimes they converted the channels into vast reservoirs and fenced in the adjacent land to protect them. But, however sore pressed to make out diligence, *bona fides*, extent of priority of appropriation, etc., none of their lawyers ever dreamed of solving the difficulties by claiming that, as prior possessors of the land, they were riparian owners in the sense that they could, without compliance with all the requisites of the law of appropriation, compel subsequent canal owners above to allow them the full flow of the water. But there was

no sense or use in holding that an appropriation of land was an appropriation of the water flow, except in so far as the circumstances attending the taking of the land might also evince and evidence a California common-law appropriation of the water. One of the chief distinguishing features of that law was an impartial and just recognition of the equal rights and claims of all classes of appropriators. It is repeated over and over, that "no distinction is made, in the rights of the first appropriator, from the use made of the water, if the use be a beneficial one; that the policy of the State is to permit settlers *in all capacities* to occupy the public lands, and that this policy has been extended equally to all pursuits, and no partiality for one over another has been evinced," etc. What possible reason could there be for not applying this "one weight and one measure" to all, without exception, who wished, under the policy of the State, to apply running streams to *any* beneficial purpose whatever? If the man who is going to irrigate lands at a distance, must actually appropriate, must show his intention and in good faith prosecute it, why should not the man who wishes to irrigate lands nearer the stream, or otherwise, acquire a claim to its waters? If one could not hold more than he needed, why should the other? If one to sue for diversion must show actual dam-

age, why not the other? (N. C. etc. v. Kidd, 37 California R. 314 *et seq.*)

Of course, while in the early cases, the judges were building up and shaping this new system, we would expect to find many *dicta* at variance with the true principles ultimately established. We would expect to find some vacillation and difference of opinion and inaccuracy of reasoning and expression, before the symmetry and harmony of the doctrines finally became complete, through discussion, investigation and the gradual growth of the law, by the process of judicial decision. There are *dicta*, we believe, in three of the earlier California cases, which may seem opposed to the views we have endeavored to maintain. The first is Irwin v. Phillips, 5 Cal. 147, which *decided* that a subsequent locator of mining claims along the banks of a stream, cannot compel a prior canal owner above to restore the water. This is perfectly consistent with all we claim. But, it was *said* that if the waters had not been taken from the bed of the stream, when the mining claim was located, they could not afterwards be taken *to his prejudice*. Not that the surplus over what the miner had already appropriated, was withdrawn from the operation of the law of appropriation, nor that the mere location of the claim gave riparian rights.

Next is Crandall v. Woods, 8 Cal. 136.

There, in 1850, one Woods took possession of public land (which we will call tract A), on which were springs, the waters of which naturally flowed through tract B, an adjoining piece of public land. In 1851, the grantors of the defendant took possession of tract B, and in that year appropriated, by using, the said flowing waters for irrigation and other natural purposes. In 1852, Woods, without having theretofore used or appropriated the water, sold (or we should say, rather, attempted to sell) his right to the springs to the complainant, who from that time on, it seems, supplied a neighboring town, using part of the water for that purpose; and in 1856 the complainant sued to enjoin the defendant from continuing the same use of the water which his grantors had commenced in 1851; but it did not appear that the said use by the defendant materially diminished the quantity or rendered the supply inadequate to the wants of the town—in other words, it did not appear that the defendant had at all interfered with the rights to which the complainant was entitled under our theory of the law of appropriation, which demands that the surplus over what is required for the beneficial uses of the appropriator, may be again appropriated. The case only *decides* that where a party not only takes possession of the banks but also appropriates a portion of the water by actually using it, he is entitled *to the rea-*

sonable use of it against a subsequent appropriator of the water for a purpose which is not interfered with by such reasonable use, or rather that such subsequent appropriator cannot come into a court of equity for an injunction against such reasonable use of the surplus, which must otherwise run to waste. Indeed, the case might well stand on the ground that, as the only right of the complainant came from his appropriation, it was, as in McDonald v. Bear River, etc., 13 Cal. R. pp. 238–9, limited to the quantity needed for the purpose of supplying the town.

The opinion of the Court, however, in which only two Judges participated, undertook to place the decision also on the ground of riparian rights, exactly as has happened in other cases, such as Ferrea vs. Knipe, which is fully explained in our former brief, pp. 53-4-5. In Leigh Co, vs. Independent Co., 8 Cal. 323, the dictum of Crandall v. Woods is repeated. That case involved only a very simple point of pleading. The complaint followed the approved common-law form and was objected to for not alleging any appropriation of the water. But the complaint was clearly good on our theory. A change in the law from riparian rights to appropriation does not require any change in the forms of pleading. It was the universal custom from the beginning to follow the old precedents of declarations in water cases. When a canal owner

sued, he alleged that he was the owner of a certain ditch, etc., to, into and through which the waters of a certain stream were accustomed to flow and did flow, for the irrigating certain land or the working certain claims, etc. The circumstances of appropriation were matters of evidence, to establish the essential averment that the water ought to flow, did flow, etc. The same two cases of Crandall v. Woods and Leigh v. Independent, were cited in McDonald vs. Bear River, 13 Cal. p. 223, a case where our views on this question were sustained, but a similar complaint at the same time held proper.

Mr. Yale has truly observed, however crude and confused his work is generally, that during the time of Judges Murray and Burnett, the law on this subject "was really in a transition state"; that Judge Murray at first dissented from the doctrine of appropriation, and reluctantly gave up his struggle for the common law; at times holding that the rights of canal owners could with propriety be vindicated by the old common law. It may have been this idea of his, that appropriation was the rule of that old common law, adopted by our statute, which induced him to put Crandall v. Woods, in his opinion in that case, on common-law principles. And this seems more probable since the instruction asked for in that case did not pretend to assert the modern common-law riparian

right, but simply the right to a *reasonable* use of the water. It is absolutely certain that if anybody in those days had really believed that mere possession of the banks gave the modern common-law riparian rights, all the ditches would soon have been enjoined. In a later case, Hill v. King, 8 Cal. 338, which was a contest between a canal owner and the possessors of mining claims embracing the banks, Judge Murray, though still intimating his disapproval of the California doctrine, said that it had become fixed, so that "*none of the rules applicable to riparian owners apply,*" and Judge Burnett, in Bear River v. York Co., 8 Cal. 334, showed conclusively that not only was the whole subject in a transition state, so far as he was concerned, but that in the previous cases he could not have intended to sanction the idea of giving the mere prior possessor of the banks, the right, without user or appropriation, to compel all subsequent appropriators of water above to allow him the undiminished flow of the water.

But the decisions subsequent to the time of these judges, settle this question. Then Judge Baldwin, who as an attorney had been much employed in this kind of litigation, and Judge Field, who has so clearly placed the doctrine of appropriation on its vital principles of inapplicability of the modern common law and limitation to actual and beneficial use, brought

their great powers to the work of completing, harmonizing and justifying the law of California on this subject. The result is, that we can say that wherever the same climatic and other conditions exist, in Montana, Idaho, Colorado, New Mexico, Utah, and now Nevada, the idea that, as incident to land, flowing water can be held for speculation, by those who cannot or will not utilize it, or who do not first appropriate the water itself, is utterly exploded.

In *McDonald & Blackburn* v. *Bear River, etc.*, 13 Cal. 220, the complaint alleged that plaintiffs are lawfully possessed of certain saw-mill and grist-mill, works and *premises*, with the appurtenances, situated upon a stream called Bear River, and by reason thereof ought to have and enjoy the benefit and advantage of the water of said stream, etc. The plaintiffs claimed under one B. J. Van Court, who "had gone upon *this land* in 1850, and taken actual possession and built a saw-mill, and afterwards, but not until 1854, a grist-mill, on public land, using the waters of Bear River for mill purposes, viz.: 1,000 inches for the saw-mill, from 1850, and all the grist-mill needed after its completion in 1854." Van Court remained *in possession*, until 1854, when he placed *McDonald in possession*, and at the same time one Alexander Van Court, acting under a power of attorney from his brother, B. J. Van Court, which

authorized him to sell "my saw-mill, dwelling, etc., said mill and *other improvements situate upon a tract or claim of land on Bear River, etc.,*" executed a bill of sale in his own (Alexander's) name, conveying *to McDonald* all the right, etc., of B. J. Van Court, in the saw-mill, grist-mill, machinery, dwelling-house, kitchen, on Bear River; also, the ferry on said river, near said mills; also, "the *pre-emption of 160 acres of land, running up and down Bear River*, and belonging to said mills." In the same year, 1854, and evidently before said bill of sale, *Blackburn* made a contract with said Alexander, by which he became interested in the premises, at least to the extent of the water needed for the grist-mill. The *defendants* claimed as appropriators, in June, 1851, of said waters of Bear River, forty miles above said mills. Their appropriation, therefore, being prior to the actual possession of *the plaintiffs*, but subsequent to the location and occupation of the pre-emption claim and the actual use at and for the saw-mill of so much of the waters flowing over it, as was needed for that purpose, to wit, 1,000 inches, by Van Court, the result of the case was that the plaintiffs were held entitled to the 1,000 inches only.

The defendants contended that as there was no conveyance to *Blackburn* of any interest in the saw-mill or *in the 160 acres of land*, his rights dated only from his actual possession jointly with *Mc-*

Donald in 1854, when they succeeded to the possession of Van Court, and therefore defendant's appropriation of all the water in 1851, gave a prior and better right. That is, substantially, they relied on the *dicta* in Crandall v. Woods, etc., that the right of Van Court was the common-law riparian right—that the water right followed the land, not the improvements, (p. 227) —and (p. 223) that according to Crandall v. Woods, etc., the owner must sue? and must show that he is riparian proprietor or first appropriator. The former Court, Burnett delivering the opinion, did reverse the judgment and sustained the contention, but on the rehearing, the judgment was affirmed. This, we claim, was a deliberate, well considered and final repudiation of the *dicta* we are combating, and establishes the doctrine of appropriation to the full extent we have contended for; because, it was held that the plaintiff succeeded to all the rights of Van Court—otherwise they could not have recovered at all. But it was also held, that such rights were limited by the prior appropriation of the water; not as incident to the conceded prior possession of the land and banks, but to the extent of its actual beneficial use at the saw-mill. If the *dicta* of Crandall v. Woods as to riparian rights had been applied, the plaintiffs would have recovered for all the water in the stream, as riparian owners. We ask attention

to the opinion in this McDonald case, but will here attempt to give in part its purport, viz.: The right of the plaintiff accrued from *appropriation*, not from the possession of the banks, etc. "*This appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use.*" There is no difference in respect to the use or purpose—but the nature of the use may be important as denoting the extent of the appropriation. This right of water may be transferred like other property. The water-right acquired by the erection of the mill *and* the "possessory right of land on the stream"—such possession of the banks *and* act of appropriation *together*, being evidence of the appropriation of the water—would pass by a transfer of the land and mill. By force of the bill of sale, McDonald acquired such estate *in the premises of which he was put into possession, and on which he made valuable improvements, for a series of years*, as gave him a present right to full enjoyment, and to sue, etc.; that consequently plaintiff got the title of Van Court, but that the defendants took, by the location of their ditch, all the water not needed for the saw-mill as it was used prior to said ditch. Still, to the extent of that 1,000 inches, plaintiffs were entitled, though they wished to apply it to other beneficial uses.—"It by no means follows that because in an agri-

cultural district a party takes up a mill-seat, gets a good title—as we esteem *possession* of public *land* to be—*to the land*, and makes valuable, permanent improvements, all dependent on the use of the water as a motive power, that he means only to use *the water appropriated* for the first purpose to which he applies it."—The location of defendants' ditch in 1851, was only an appropriation of so much as was not before *appropriated* by Van Court; the defendants had the right to divert any surplus over the amount originally used by plaintiffs' grantors, and needed for running their mill.

In McKinney v. Smith, 21 Cal. 374, the plaintiffs were as much riparian owners as the defendant in Crandall v. Woods. They were the first appropriators and possessors of a tract of land, covering *bed and banks* of the stream, which, in its natural flow, ran over it, for mining purposes and as mining claims. They dug a ditch above their land for the purpose of getting rid of so much of the water as they deemed a detriment and not a benefit to their lands, in its full and natural flow. Their land was just like the swamp-land here. It was worthless, comparatively, with all the water on it, and equally undesirable if deprived of all of it. Consequently, they did just what appellants here claim to have done. They cut a ditch, by which they

could turn away all the flow, and afterwards claimed the right to turn it back as they saw fit to work their claims, and to deal with the surplus as belonging to them in gross. It was held that the defendants had the right to appropriate the surplus. The Court said, in effect, that so far as the plaintiffs were appropriators *of water*, their appropriation was for a special and limited purpose—"to wit: the working of the *bed and banks* of the creek below"—that there was no *general appropriation of the water* by the plaintiffs before the defendant's rights attached—that they may have had a prior right to the use of sufficient water to work the bed of the creek, "without thereby securing a prior right to all the water of the creek, to be used in some distinct and separate undertaking at any indefinite future period."

Other cases might be added, but we think we have established clearly what was and is the California law on this point. If mere possession of bed and banks had given riparian rights, we would have heard little of this doctrine of appropriation, which, as Mr. Yale says, is the opposite of the common law here invoked. The fencing in of, or settling upon the banks would have been early utilized as a labor-saving machine or instrument of speculation and tribute-levying. The Bear River case would not have made its appearance in volume after volume of the reports, bristling with

knotty questions peculiar to the law of appropriation, if the location of the pre-emption claim and its occupation and improvement conferred the right to enjoin all subsequent appropriators from at all interfering with the flow. But here, it is claimed, that without any possession or improvement or appropriation, the making the first payment and securing a certificate for one of the smallest subdivisions of this swamp, if it touch one of these depressions, is practically the acquisition of the whole power and flow of one of the most important rivers in the State; repeals the whole law of appropriation, and defeats the policy of the State over a region capable of itself forming a State, and confers the right to destroy millions of wealth and thousands of homes, invested and made in carrying out that policy, after standing by and looking on over four years without a murmur of dissent, and without even a pretense of having suffered one dollar of actual damage.

In Nevada, as shown in the petition for a rehearing, p. 21, the doctrine of the California cases above cited by us, and decided after Crandall v. Woods, such as McDonald v. Bear River, has been followed and approved; and though they at one time held to a distinction between a prior possession of bed and banks, and a prior patent, without any appropriation of the water itself, as giving

riparian rights against a subsequent appropriation of the water, yet, since the decisions in the Supreme Court of the United States, above noticed by us, were rendered, they have been recognized in Nevada as doing away with the distinction between a prior possession and a prior patent, which, as at one time treated in Nevada, was the same as the distinction between State and United States land; and in that State now the law is the same as in Colorado.

If, then, a mere prior possession of bed and banks, or of land on one bank, does not confer riparian rights; if appropriation of land is not appropriation of the water flowing over it, neither does a similar purchase of land give riparian rights—and for identical reasons. The possessor is presumed to be the owner, and no subsequent possessor can set up the outstanding title. The result cannot be greater or different, if the party, instead of being presumed to be the owner from the fact of possession, is proved to be the owner by the fact of purchase. In both cases the question is as to the existence of a "law annexing the flow to the land, by the operation of the law itself." The moment it was settled that a patent from the United States did not pass the right to the flow of water previously diverted by others than the owner, the only reason ever given for any application of the modern English doc-

trine of riparian rights to such lands vanished forever. This is well illustrated, as well by the Nevada as by the California cases. No lawyer anywhere ever thought of contending that, if the owner of riparian land himself permanently diverted the flow, or authorized such diversion, his grantee of the dry bed could compel its restoration. But until the Supreme Court of the United States otherwise held, the difficulty was to get over the assertion that the United States had never sanctioned, nor bound itself by, any of the diversions on its lands.

For this reason only it was contended that a prior appropriator had no rights, as against the United States, and as a corollary, none as against its vendee by patent subsequent to the appropriation. But just as soon as the United States Courts decided as they did, the Supreme Courts of California and Nevada held in effect, that an appropriation on United States land always stood just like an appropriation on State lands; and as there never was any reason why, as to State lands, full operation should not be given to the law of appropriation, so now there is none as to Federal lands. (Osgood v. El Dorado Co. in Cal., and Jones v. Adams, 6 Pacific Reporter 442, in Nevada.) There is a further plain distinction which may be noticed here. If the owner of land in the exercise of his proprietary rights diverts the flow

into some new channel and then sells, no riparian rights, pass as appurtenant, even where riparian law prevails. If he sells before diverting they do, *because* the law works the annexation except when prevented by the act of the *owner*. But if the State, being the owner, in the exercise not of proprietary but of legislative power, adopts a policy and a law which does not work the annexation, then the priority of the diversion or sale is immaterial.

In further support of these views, and of the unqualified and unconditional abrogation of the modern common law as a law in California, and the substitution of the law of appropriation to its full extent, and consequently of the true and settled construction of the statute adopting the common law, we cite Barnes v. Sabron, 10 Nevada, 230; Smith v. O'Hara, 43 Cal. 375, a very strong case in favor of the interpretation we have given to the earlier cases, Crandall v. Woods, McDonald v. Bear River, etc. There, if the statute adopting the common law embraced the modern riparian doctrine, the prior ownership of the bed and banks by the miners, would at once, according to the prevailing opinion in this case, have been decisive. Also, Higgins v. Barker, 42 Cal. 234, where the doctrine of the Bear River case was applied to farming lands in Santa Barbara. There the appropriation, restricted to the extent of the

beneficial user and appropriation *of the water*, was made by the plaintiff of the waters of a creek *flowing along the margin of his land.* We have in the brief heretofore filed (Brief, pp. 48 to 60) endeavored to analyze all the California decisions which can be cited against the propositions here set forth; proving, we think, that they can all be reconciled therewith—either on the ground that they were well decided on the doctrine of appropriation, or involved vested rights under Mexican grants. And, even if your Honors should come to a different conclusion, we submit that one or two decisions, made either without argument, or upon small consideration, in cases of little importance, and of none except to the immediate parties, should not be allowed to reverse the wise and settled policy of a great State, so firmly established by a series of *decisions,* from Eddy v. Simpson to Osgood v. El Dorado Company, especially when now the permanent and paramount agricultural interests, capable of indefinite expansion, are so much more entitled to and dependent upon the unflinching assertion of that policy, than ever were the lesser and temporary necessities of mining.

Such being the policy and law of California, when the Code was enacted, what is the proper construction and effect of its codification? (Brief, pp. 2 and 3, and 32 to 36.)

The very idea of codification suggests a formu-

lation of existing law, not the making of a new system. "Codification does not involve any innovation on the matter of the existing law." (Austin, vol. 2, p. 118.) In entire harmony with this is the language of the statute creating the Code Commission, and of section 5 of the Civil Code itself. And that the principle was not departed from in this instance, is clear, as well from what the sections of the Code relating to appropriation of water contain, as from what is left out of the Code on the subject of riparian rights.

We say the Code found the law of California to be that of appropriation, as we have defined it, with the single exception of possibly vested rights under Mexican grants as appurtenant to specific lands. We say the Code simply states and formulates that law and that possible exception; that, if it were to-day attempted to do just what we say the Code did, fitter language to effectuate the purpose could hardly be chosen. The Code was not intended to serve a temporary purpose, or to give a temporary license. If so, its enactment was idle and purposeless—such a license already existed, and would not have been affected had the Code in terms formulated the modern common-law riparian doctrines, as did the New York Code from which it was copied. It was intended to preserve and express a policy by enacting it in the form of a permanent, general law—a policy and

law just as much needed, and all the reasons for which would exist in as full force, after sales by the State as before—more so, in fact. And, as we think is proved in our former brief, this is made evident, beyond all question, by the omission, in the same connection, while copying into our Civil Code all the other provisions of the proposed New York Code, to re-enact its elaborate formulation of riparian rights, or any single feature or word of it. If our Code provisions—constituting a complete and elaborate law and system of appropriation, faithfully reproducing the existing law on the subject, to which the short proviso or saving clause concerning riparian rights, so much relied on, is tacked—had been intended only to provide for an interim license, pending the sale of State land, the legislature would have made the body of the title to consist of the New York formulation of riparian rights; and have tacked on the license as a mere proviso or saving clause to the general and permanent law of water-courses. The tail would not have been made thus to wag the dog.

On the other theory, we must assume that the legislative intent was to enact two separate and inconsistent laws. One applicable to cases, where, on the whole course of a stream, nobody had acquired even an inchoate title—a case which has perhaps never occurred since the Code; or, if it could, the

class was so insignificant, that presumably it was not in the thought of the law-makers. The other the great class where, somewhere on the course of a stream, the title to the banks had vested or was likely to fall into private ownership. And intending this, that they deliberately set to work to frame a positive and elaborate system for the lesser and temporary interests, omitting all enactment of rules to govern the other.

And that, too, when every imaginable reason of substance and policy in favor of appropriation applied equally to each class; and while the Code, shows on its face that they were faithfully and almost literally reproducing every feature of the New York copy, which they did not deem inapplicable and unsuited to be introduced as part of the permanent, general law of California.

On the other hand, how plain and sensible and consistent the construction, that in framing a permanent civil code, it was considered that the modern English riparian law was inapplicable to our condition and wants, and consequently had not been introduced as part of the common law here, and was no part of the existing law they were commisisoned to codify. That, therefore, they would omit all mention of it, except in the proviso, intended to relegate to the courts the question whether, prior to the adoption of the law of appropriation, vested riparian rights had accrued under Mexican grants;

thus reproducing the California law of appropriation in all its parts, and carrying out the policy which dictated that law, in accordance with the original wish and intention of its framers, as far as the reasons on which it was based existed, limited only by the constitutional guaranty protecting vested rights.

This falls in with all recognized precedents of construction. (See Breeding v. Davis, 16 The Reporter 667.) and equally with the settled rule that in construing every contract, or grant, you construe it with reference to surrounding circumstances and existing law and policy. When the State—after enacting this law of appropriation, after declaring this great public policy—allows her citizens to purchase her land, and issues a patent therefor, how should that patent be construed: in the light of the riparian laws of other lands and other times, or in the light of her own previously enacted statute and her own previously declared policy? Shall the water fifty miles off pass as an appurtenant to the land patented, or shall the law authorizing the patent be construed *with* the law authorizing the appropriation, when both may well stand together—when neither antagonizes the other—when the policy which dictated the one is in full harmony with the purpose of the other—especially when to hold the water to pass as an appurtenant most undeniably precludes all practi-

cal effect and beneficial operation of the law regulating and authorizing appropriations.

The very reason why the Code in this exceptional instance formulates no rules governing riparian rights, is that it was not contemplated that new riparian rights could arise. As to the existing ones, if any there were, it was useless and idle to attempt to legislate about them, except by a saving clause, the sole purpose of which was a legislative disclaimer of any intent to add to or take from the law of their being. The proviso is simply a declaration that it was not intended at all to legislate with reference to them; but that wherever and in so far as they did not already exist—to the extent that the legislative will was free to act—the intention was to establish the law of California on the broad and just and politic basis of appropriation. For a fuller discussion of these points we beg leave to refer to the former brief, pp. 1 to 144, and to the petition for a rehearing.

III.

The prevailing opinion on the former hearing, presents in their full force all the arguments which have been or can be advanced against our views as above expressed. It states that in Ferrea v. Knipe, in 1865, for the first time occurred in California a judicial recognition of the modern common law in-

voked, and that it has never been overruled or doubted, nor does it conflict with any of the earlier cases. If this refers, as the language indicates, only to the *opinion* in Ferrea v. Knipe, we submit we have shown that it does conflict with the principle established by and the *decisions* in all the early cases and most, if not all, of the later ones. If it is to be referred to the *decision* in Ferrea v. Knight, which alone is of any weight in this discussion, we agree that it should not be found fault with. To have decided the case any other way, would have been a recognition of the modern English doctrine upon which alone the case of the losing party was based and argued. The *decision* as it stands is as plain an application of the California rule, as we interpret it, as any in the books.

It is next said that our contention requires the insertion into the State patent or certificate, of a reservation of the water, contrary to the rule that the owner cannot be divested of any interest in his property by the act of a third party. But, we submit, the question is not of an exception or reservation, but of a correct construction of the grant. If the law did not annex the water as incident, the grant does not pass it as incident. The owner is divested of nothing. The State made the law by which her grant is construed. As to the analogy of grasses and trees, it is only another way of stating the same question. We did adopt the common

law of fixtures. We did not adopt the modern common law of easements and servitudes, either of air or of water. It is then said, the principle of appropriation only applies where neither party has a grant, actual or presumptive. Why not? If there is anything in the maxim that the reason of the law is the law, why should the question whether California adopted a certain rule of common law in 1850, depend upon the circumstance that in 1870 California sold a section of her swamp lands? If the obtaining of the patent defeats the operation of the principle, why was not the Osgood case differently decided? Why should not every patent issued prior to 1866 defeat every prior appropriation? To reach the now universally accepted conclusion that it does not, do we interpolate a reservation, or allow the act of third parties to divest rights; or do we simply say there never was any law or policy annexing to a quarter-section of Buena Vista swamp, the right to the flow of all the waters from there to the source of Kern River in the Sierra, and forbidding the United States, in pursuance of her policy, as shown in the desert-land and other acts, to utilize it so as to fructify all the vast possessions capable of irrigation by it?

Then Hall v. Smith, 27 Cal. 476, is quoted as holding that the rules of the common law were never materially modified in this State. Surely

this *dictum* of Judge Sanderson's will not, on reconsideration, be seriously relied on, as giving any assistance in the discussion and determination of questions like those here involved. That case is simply one in line with the others on which we rely, upholding the rights acquired by appropriation, as we understand it.

What is next said about Atchison v. Peterson, we have already endeavored to explain. If it had been the policy of California to apply the modern English doctrine to the public lands, we respectfully submit, it was the easiest thing in the world fully to apply it. Was it not so applied in the states east of the Rocky Mountains, where the conditions called for it?

If one took up lands above a ditch, why could he not, if such was the policy, use the waters flowing over it for all riparian purposes? Judge Field gives the real reason, viz., that there was no such policy—that the riparian law was *inapplicable;* and being inapplicable, it could be disregarded on State lands by the mere will of the State; on United States lands, in the absence of the assertion by the United States of a common law or Mexican law right to the contrary.

As to the question of rebuttal we refer to the former brief, pages 4 to 23 and 187 to 189, and to Petition for a Rehearing.

It is next said the Court below found that neither

party was a riparian owner. This, we submit, is a mistake, as pointed out in the Petition for Rehearing, pages 51 to 53. See also brief, pages 143, 141, 142, 144, especially the case in 10 ch. div., 707, and the Desert Land Act of Congress.

As to the question of estoppel, or rather of laches, we refer to the former brief, pages 144 to 186.

The prevailing opinion, (citing Hill v. Smith and Atchison v. Peterson) says that Hill v. Smith gives as the reason for riparian law, that the flow imparts fertility to the land, and domestic uses require it to be pure; therefore that law is not applicable to miners, because the conditions upon which it is founded do not exist in their case; and proceeds thereupon: "The conditions upon which it is said the rule is founded do exist in agricultural districts. * * And after carefully examining all the cases bearing on these questions, we are unable to find one in which it is held, or even suggested, that *outside of the mining districts, the common-law doctrine of riparian rights does not apply with the same force and effect in this State as elsewhere.*"

This is the key-note of the opinion. With this essential postulate, all the rest follows easily and logically; without it, the whole crumbles to nothing.

We, therefore, earnestly ask a careful reconsideration of this enunciation, confident that it must result in the conviction on the part of every member of this Court that it was inadvertently adopt-

ed, and has not the support of either principle or authority. In the first place, the *dictum* in Hill v. Smith, as cited, is as much authority for an explicit assertion that the common law pure and simple was always in force in the mining districts, as that it obtained in the agricultural. But the other citation, Atchison v. Peterson, is later, and is an authoritative *decision* to the contrary, and in it Hill v. Smith is explained as we have above contended it should be, as merely carrying out the true doctrine of appropriation, and limiting the right to the extent of the appropriation. Further, in Basey v. Gallagher, in the same volume, which did not arise in a mining district, the distinction between mining and agricultural districts is clearly shown to be untenable.

In Higgins v. Barker, 42 Cal. 234, the premises were outside the mining districts, yet the doctrine of appropriation was applied. If it had been supposed that the modern riparian rule applied there with the same force and effect as in England, would or could that case have been so disposed of? Would not this Court have said: "The Court below seems to have been laboring under the misapprehension that this was a mining district; but it is outside of them, and consequently the doctrine of appropriation can have no application. The rights of the plaintiff in the waters flowing on the margin of *his* land—of which he owns the bank, are

fixed by the law of riparian ownership." That if the defendant, as one would infer from the report, was also a riparian owner, his rights were fixed by the same law, and if not, that he was a mere trespasser, etc.

But in the Osgood case in this Court, the very distinction was made and strenuously insisted on, and it was deliberately decided there was nothing in it.

However, even in the absence of precedent, which we insist is here present in unbroken and overwhelming force, can there be any pretense for such a distinction? What reason can be suggested for giving a miner the right to divert water to wash his gravel, which would not also give the farmer the right to divert it to raise his crop? There was plenty of irrigable and irrigated land in the mining districts. There were there large and prosperous towns requiring and receiving, and thousands of homesteads dependent upon, pure fresh water for domestic and other uses.

So far as the policy of the State is shown by judicial decisions, any distinction drawn from the purpose of the appropriator or based upon the assertion of a greater exigency in the case of miners, was always disallowed. In the legislation of both the State and the United States, we not only find no trace of such a distinction, but, on the contrary, explicit and designed expression of the reverse.

The *recognition* of State policy in the law of 1866, is not restricted to the mining regions or to mining purposes. (Yale, 138.) The Desert Land Act (Supplement to Revised Statutes, Vol. I., page 289), is still more explicit.

The State legislation for the agricultural counties, passed prior to the Code, and not affected by the Code, shows the same disregard of geographical or geological limitations.

The common law, so far as it was adopted, was adopted by the State of California, for the State of California. It was adopted or rejected once for all, and the law of appropriation became a State law, based on a State policy, in California, as in Colorado and elsewhere. If no mines had ever been discovered, or if those found had been worked out in a few months, the underlying reasons for the policy would have remained, and with them the policy. There are mines now worked on or near Kern River, and to a greater or less extent in most of the agricultural counties.

But the law of California does not depend and never did depend on the chance of their discovery, or their extent and importance when discovered. If we confine this law to the mining districts, did the law follow the prospectors, and spring up from time to time, and place to place, according to their success? Would it have been proper in early times, to call geologists and mining experts to de-

fine the territorial operation of the common law? And when the Code Commissioners came to formulate the existing law, why did they not confine it to the mining regions? As we have seen, they said nothing about the common law, except in the saving clause, and not even there, if we have correctly construed that clause. If the modern common-law riparian rule had been the general law and policy of the State, and appropriation the exception, confined to the diminishing extent of the mining districts and designed only for the fostering of the mining interest, then in a state of progressive decadence, would not the method of the Commissioners have been reversed.

But, as the general law was appropriation—as the only exception was the case of Mexican grants; as that exception was not governed by the common, but by the civil or Mexican law—they very properly said nothing whatever about the common law. Nothing was to be gained by formulating the Mexican law, with which and the California law of appropriation only they had occasion to deal. Because the very idea of a Code excludes that portion of existing laws and statutes which is understood to have only a partial or temporary operation. Where, for instance, a body of statutory law had already been repealed, it would not be reproduced, but a simple saving of already vested rights would

suffice for all purposes of codification. We again ask attention to the Desert Land and other Acts of Congress above referred to, in connection with the finding that we did have riparian rights, if the modern common law applied. By that law the United States was the only riparian owner on Kern River. But even conceding that they were only so down to the swamp, that embraced many miles of the river, and, on appellants' theories, made all of the land through which the Calloway runs riparian land. The appellants have not been injured by our use of the water. We stand in the shoes of the United States, the supra-riparian proprietor—even if not, as we claim, the sole riparian proprietor.

The very postulate of the case of appellants is that, by the operation of law, to all this land above, as an incident, was annexed the right to the flow and to the reasonable use of it on these lands; this then was a vested right of property in the United States and it passed to us by the statutes of the United States. On their own theory, before the State or her grantee can complain, it must be shown that an improper exercise has been made of this right—that the United States has taken more than its share under the circumstances. When that appears, a recovery may be had to the extent of the actual damage—not, as against a mere trespasser, for nominal damages. For we suppose

it will not be contended that even under the present English law, one riparian proprietor can recover against another for taking water which the former could not at the time make any use of. and the deprivation of which caused him no detriment.

Respectfully submitted,

GARBER, THORNTON & BISHOP,

Of Counsel for Respondent.

Service of copy of within
Brief hereby admitted
this 25th day of May, 1885.

Stetson & Houghton
Att'ys for appellants.